Highland Superstores, Inc. *and* Highway Drivers, Dockmen, Spotters, Rampmen, Meat Packing House & Allied Products Drivers & Helpers & Office Workers & Miscellaneous Employees, Local 710, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Cases 13–CA–28116 and 13–CA–28225

January 17, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On May 23, 1990, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by reassigning driver Nicholas Robinson from the tractor-trailer to working primarily in the warehouse from mid-November through January 1989. The Respondent has failed to rebut the General Counsel's prima facie case that Robinson's apparent switch in his union sympathies led to his removal from driving the tractor-trailer—a job on which he had successfully bid in late 1987 and later made known that he enjoyed performing, and for which he received a high performance rating in October 1988 and related merit pay raise.

We note that Robinson was temporarily taken off the tractor-trailer in September and assigned to drive the smaller shuttle truck for what was to be a period of up to 6 weeks. The Respondent attempted to show through the testimony of Supervisor John Mulvey that Robinson ceased driving the tractor-trailer beginning in September or October and that the tractor-trailer was reassigned to shuttle truck driver Pat Zimmer at that time because the Respondent was entering its busy season and Zimmer needed the tractor-trailer in order to handle the loads more efficiently. Mulvey's testimony, however, was implicitly discredited when the judge credited Robinson's testimony that he was told in September that the Respondent wanted to give Zimmer some experience driving the tractor-trailer. Significantly, the September reassignment was countermanded when Robinson complained to the operations manager, and Robinson returned to driving the tractor-trailer after 1 week. His next reassignment from the tractor-trailer to the warehouse occurred in November shortly after he wore a union hat to work. When Robinson again complained to the operations manager, the reassignment again was countermanded and Robinson returned to driving the tractor-trailer. A few days later, however, the operations manager's countermand was ignored or revoked and Robinson was assigned primarily to the warehouse. Significantly, Robinson was given no explanation when he was reassigned in November in spite of the operations manager's order. Indeed, Robinson was told only that ''that was the way it was going to be.''

Therefore, in view of the judge's having discredited Mulvey's testimony regarding the reason for Robinson's September reassignment, and given that Robinson was summarily reassigned from the tractor-trailer to warehouse duties in November, even after the operations manager's countermand, we agree with the judge that the Respondent has failed to show that the mid-November to January reassignment would have occurred absent Robinson's surprising intervening display of sympathy toward the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Highland Superstores, Inc., Lansing, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard Kelliher-Paz, Esq. and *Linda McCormick, Esq.*, for the General Counsel.

A. David Mikesell, Esq., of Detroit, Michigan, for the Respondent.

Susan Brannigan, Esq., of Chicago, Illinois, for the Union.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating and threatening leaders Dino Grando and Frank Colangelo, we agree with the judge's analysis that *Pillows of California*, 207 NLRB 369 (1973), is distinguishable and therefore find it unnecessary to determine that case's continuing viability.

[2] At the hearing, the Respondent conceded that its elimination of the third shift was a mandatory subject of bargaining and that it was obligated to bargain with the Union if the Union was properly certified as the employees' exclusive representative for purposes of collective bargaining, a matter which we have previously resolved in *Highland Superstores*, 297 NLRB 155 (1989). It contends, however, that the judge's proposed remedy therefor, i.e., reinstitution of the shift if requested by the Union, is ''excessive.'' In view of the fact that this case raises no issues implicating the Board's decision in *Otis Elevator Co.*, 269 NLRB 891 (1984), we find that the Board's traditional reinstitution order is appropriate. However, we shall permit the Respondent to introduce previously unavailable evidence, if any, at the compliance stage of this proceeding to demonstrate that reinstitution of the third shift is unduly burdensome. *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me in Chicago, Illinois, on October 2 and 3, 1989. The charge in Case 13–CA–28116 was filed by Highway Drivers, Dockmen, Spotters, Rampmen, Meat Packing House & Allied Products Drivers & Helpers & Office Workers & Miscellaneous Employees, Local 710, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFLCIO (the Union) on October 2, 1988, and the complaint in that case was issued on December 28, 1988. The charge in Case 13–CA–28225 was filed by the Union on December 5, 1988, and amended on December 9 and 29, 1988, and the complaint in that case was issued on January 18, 1989. Both complaints were amended on October 2, 1989. The complaint in Case 13–CA–28116 alleges, in its final form, that Respondent Highland Superstores, Inc. (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing a rule which prohibits discussion of wages among employees; and violated Section 8(a)(1) and (5) of the Act by granting a wage increase to all employees in a bargaining unit of which the Union in the Board-certified representative, by reducing overtime work for leaders in that unit,[1] and by eliminating its third shift, all without giving the Union prior notice and an opportunity to bargain. The complaint in Case 13–CA–28225 alleges, in its final form, that the Company violated Section 8(a)(1) of the Act by interrogating an employee regarding his union activities and sympathies; by telling an employee to remove his union hat; and by telling an employee that he would be discharged if he did not remove his union hat or for his union and/or protected union activities. That complaint further alleges that the Company violated Section 8(a)(1) and (3) of the Act by changing the job duties of and transferring employee Nicholas Robinson; and violated Section 8(a)(1) and (5) by changing its overtime policy from voluntary to mandatory, and by changing the discipline imposed on employees for violating its smoking policy, without giving the Union prior notice and an opportunity to bargain.

On the basis of the entire record,[2] including the demeanor of the witnesses who testified before me, and after due consideration of the briefs filed with me by counsel for the General Counsel (the General Counsel), the Union, and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is a Michigan corporation with an office and place of business in Lansing, Illinois, where the Company is engaged in the sale and distribution of household and electronic appliances. During the calendar or fiscal years preceding the issuance of the complaints, representative periods, the Company derived from such operations gross revenues exceeding $500,000, and purchased and received at its Lansing facility products, goods, and materials valued in excess of $50,000 directly from points outside Illinois. I find that, as the Company concedes, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The representation case

On April 11, 1988, the Union filed a petition with the Board, docketed as Case 13–RC–17344, seeking certification as the representative of a unit which is described in detail infra in Conclusion of Law 5, and which consists basically of the Company's warehousemen, truckdrivers, leaders, janitors, and maintenance employees at the facility involved.[3] The Company contended that seven individuals classified as leaders were supervisors and should be excluded from the unit. A hearing with respect to this issue was conducted on May 4, 1988, before Hearing Officer Nancy Harris. On May 18, 1988, the Regional Director issued a Decision and Direction of Election finding all seven leaders to be supervisors, and directing an election in a voting group which excluded them. The Union filed a request for review, dated May 27, 1988, in which it contended that none of the leaders was a supervisor. By Order dated June 22, 1988, the Board found that one of the seven leaders (Chuck Gabon) was a supervisor, but that the other six (Steven Powell, Frank Colangelo, Dino Grando, Gerald Kulikowski, Frank Brod, and Tim Balmes) were employees. Accordingly, the Board found that these six were to be included in the unit.

The election was held on June 24, 1988, and the ballots of the leaders found to be nonsupervisory were commingled with the other ballots. The Union prevailed by a vote of 24–22, with no ballots segregated as challenged ballots. Over date of July 1, 1988, the Company filed objections to conduct affecting the results of the election. On August 5, 1988, the Regional Director issued a Report on Objections which overruled the objections and certified the Union as the representative of the unit described infra in Conclusion of Law 5. This unit includes the six leaders whom the Board had found to be nonsupervisory. Over date of September 1, 1988, the Company filed with the Board ''Exceptions'' to the Regional Director's Report on Objections. On February 21, 1989, the Board denied Respondent's ''Request for Review'' (thus referring to the ''Exceptions'').

The unfair labor practice Cases 13–CA–28572 and 13–CA–28673 docketed

About October 4, 1988, and again about March 9, 1989, the Union requested the Company to recognize the Union as the representative of the certified unit. About October 14, 1988, and again about March 20, 1989, the Company rejected this request. Pursuant to charges filed by the Union in Cases 13–CA–28572 and 13–CA–28673, a complaint issued

[1] The record varyingly refers to such persons as lead persons, leadmen, group leaders, and leaders. Except in setting forth the unit description, which refers to them as lead persons, this decision will refer to them as leaders.

[2] Pursuant to Sec. 9(d) of the Act, the record in the representation case which led to the Union's certification is part of the record in the instant cases.

[3] At that time, this facility was located in Hodgkins and Bedford Park, Illinois. In May 1988, the facility moved to Lansing, Illinois.

against the Company alleging that its admitted refusal to honor the certification violated Section 8(a)(5) and (1) of the Act. On October 24, 1989, after the close of the hearing before me, the Board issued a Decision and Order sustaining that complaint and ordering the Company to recognize and bargain with the Union. *Highland Superstores*, 297 NLRB 155 (1989). On November 3, 1989, the Company filed a petition to review that Order with the United States Court of Appeals for the Sixth Circuit, with the docket number 89-6357.[4] The Board filed a cross-petition for enforcement of the Order, with the docket number 89-6561. At the time I signed my decision in the instant case, 89-6357 and 89-6561 were still pending [927 F.2d 918 (6th Cir. 1991).]

B. *The Alleged Unlawful Rule Forbidding Discussion of Wages*

Employee Steven Powell, a warehouseman when he testified before me in October 1989,[5] credibly testified that shortly after he was hired by the Company as a material handler about April 1985, then Warehouse Manager William P. Lewis, admittedly a supervisor, issued a memorandum forbidding employees to discuss wages with other employees. Further, Powell credibly testified that about October 1986, the Company issued and posted a memorandum, signed by admitted Supervisor Michael Lovett, to the same effect. Employee Nicholas Robinson, a driver/warehouseman, credibly testified that in August 1987, Paul Kruzel, an admitted supervisor who was then Robinson's immediate superior, told him that employees were not supposed to talk about their wages with other employees. Employee Robert Tidwell, a lift-truck operator, credibly testified that in November 1987, during a periodic wage-review interview with Lewis and Lovett, Lewis said that employees could be terminated for discussing their wages with other employees. Employee Robinson credibly testified that about January 1988, Lewis told him that it was company policy that employees not discuss wages with other employees.

About June 17, 1988, David Mondry, who is chairman of the Company's board of directors, conducted an employee meeting attended by, inter alia, Lewis, Lovett, Kruzel, and regional director of human resources, David Andre. Employee Tidwell asked Mondry why, prior to receiving raises, employees had been sent memos saying that the employees could not talk about the raises, that it was grounds for termination if they were caught talking about them with other employees. Mondry replied that he was unaware that such memos had been sent. He went on to say that he had no objections to employees' talking about wages among themselves. He said that he would not answer an employee's questions about what another employee made, but that ''in terms of employees talking amongst themselves about wages . . . it is perfectly fine. No problem with that. There was no policy that says you can't do that.'' Mondry is not based in

[4] Because the unfair labor practices found in that case occurred in Lansing, Illinois, within the Seventh Circuit, an enforcement proceeding initiated by the Board would, as a matter of Board policy, have been filed in that circuit. However, the Sixth Circuit has jurisdiction of the proceeding initiated there by the Company, because it is a Michigan corporation which does business in Michigan, within that circuit. See Sec. 1(f) of the Act.

[5] Powell was a leader between July 1987 and the beginning of October 1988. Although the Company contends that he was a supervisor during that period, it makes no contention that he occupied that status at any other time.

Chicago; and Andre testified that Mondry would not necessarily know of any separate policies developed or implemented at the individual facilities. Mondry did not speak directly to any of the Lansing employees who received raises about October 1988. Employee Tidwell, who began working for the Company about December 1985, credibly testified in October 1989 that this June 1988 meeting was the only occasion on which he had ever seen Mondry.

As previously noted, the Union was certified by the Regional Director on August 5, 1988. As discussed infra part II,D,1, on August 8, and September 8, 1988, the Company's corporate compensation manager issued to all of the Company's facilities, including the Lansing facility, a wage-increase policy, regarding October 1988 wage increases, whose effectuation as to the Lansing bargaining unit is alleged in the complaint as a violation of Section 8(a)(5) and (1). Employee Tidwell credibly testified that in October 1988, when advising him that he was going to receive a wage increase, Operations manager Brian Sheehan (an admitted supervisor) told Tidwell that his wages were ''confidential'' and he was not to discuss them with other employees; and that at the end of this interview, Supervisor Lovett said that Tidwell's wages were not to be discussed with other employees. Leader Frank Colangelo (not to be confused with Warehouse Manager Vince Colangelo or employee James Colangelo) credibly testified that in October or November 1988, after telling him what wage increase he was going to receive, Lovett told him not to let anyone else know how the size of this raise, ''there is a company policy we are not supposed to discuss wages . . . he didn't want me to discuss raises, since there would probably be people who got less of a raise and he didn't want to create any animosity between co-workers . . . there is a company policy not to discuss wages. And you should adhere to that policy.''[6]

C. *Alleged Unlawful Threats and Interrogation*

1. Remarks to leader Dino Grando

On November 8 and 9, 1988, the Union picketed Respondent's Lansing warehouse. During the lunch hour on that day, leader Dino Grando asked his supervisor, Lovett, if Grando could go out there and see what was going on. Lovett said no, he did not think that it was a good idea for Grando to go out there. Accordingly, Grando did not go out there at that time.

However, after work that day, Grando did go out to see what was going on. On the following day about 5:30 a.m., about a half hour before Grando's shift began, Lovett approached him in the cafeteria and asked what the Union had to say. Grando said that the Union was thinking about picketing and boycotting the Lansing store. Lovett said that the Union did boycott the Lansing store and ''they got chased away by the cops.''[7]

[6] Employee Robinson credibly testified that he, Tidwell, and Powell had in fact discussed what rating they received and what raise it resulted in. However, there is no evidence that management found out about these discussions.

[7] The complaint alleges that Lovett unlawfully interrogated Grando. The General Counsel's brief alleges that Lovett's remarks also constituted unlawful threats. See infra, part II,E,2. My findings under this heading are based on Grando's testimony. Lovett no longer worked for the Company at the time of the hearing, and was not called as a witness.

2. Alleged unlawful conduct regarding leader Colangelo's union hat

On the following day, November 9, leader Colangelo obtained a black hat, with a small gold union logo on it, which he wore into the plant and when he punched in. About 10 minutes later, Supervisor Michael Lovett told Colangelo to come to the warehouse manager's office immediately. Upon Colangelo's arrival, Lovett asked, ''what are you wearing that [using what Colangelo testimonial described as a 'couple of four letter words'] hat for?'' Colangelo replied, ''Mike, I don't want you to take this as an indication that I am slapping anyone in the face. I simply like the hat. I like hats. I have a collection. I wanted to wear it.'' Lovett said that it was ''wrong'' of Colangelo to wear the hat, that Lovett did not want it out there, that he did not want his leadmen expressing any sort of prounion activity, that he considered Colangelo part of management and Lovett did not want him sending''wrong signals to the people.'' Lovett said that''the boys upstairs are going to remember'' Colangelo's hat, that he was going to have serious problems if the Union ''doesn't make it in,'' that he should take it off, that he was hurting himself, and that it was in his best interest to take it off. Lovett said that he did not care if the average lift-truck driver wanted to wear a union hat, that that was his business, but that Colangelo was a leadman and ''you will not wear this hat.'' Lovett did not tell Colangelo that he would be terminated if he wore the hat.

That same day, Lovett and Supervisor Kruzel saw truck-driver Robinson, admittedly a rank-and-file employee, wearing a union hat. Lovett asked him what he was wearing on his head. Robinson said he was wearing a hat. Lovett said, It looks like a lump of [scatological expression] to me.''[8]

3. Alleged unlawful discrimination against employee Robinson

When hired by Respondent in August 1987, employee Robinson was initially assigned to loading trucks in the warehouse. However, about November 1987, he successfully bid on the job of tractor-trailer driver, which he began to perform about January 1988.

In March or April 1988, when Robinson was walking into the break room through supervisor Lovett's office, Lovett called him aside and said, ''We got to get this Union out of here. Because if the Union gets in here, [the Company] is going to get rid of the trucks, and there won't be any more drivers' jobs.'' On an undisclosed date before the June 1988 representation election, Robinson volunteered to Human Resources Director Andre that Robinson had been in other unions before, did not agree with them, did not like them, and did not want to have any part of them. After giving uncontradicted testimony about this conversation, Andre testified that the Company viewed Robinson ''as a no vote in the union situation.''

Respondent owns a tractor-trailer, which can be legally driven only by the holder of a ''D'' license, and a straight (''shuttle'') truck, which can be legally driven by the holder of either a ''C'' license or a ''D'' license. Between January and September 1988, Robinson, who at all material times has possessed a ''D'' license, spent about 95 percent of his time driving the tractor-trailer, and the rest of his time loading or unloading it. During at least the latter part of this period, employee Pat Zimmer drove the straight truck.

On an undisclosed date before September 1988, Zimmer, who had previously held only a ''C'' license, obtained a ''D'' license with Robinson's assistance. In September 1988, Lovett and Kruzel told Robinson that in order to give Zimmer experience in driving the tractor-trailer, for the next 6 weeks he was going to be assigned to drive it and Robinson would drive the straight truck, after which Robinson would be returned to the tractor-trailer. Robinson angrily protested that it was not fair that his job should be taken away from him in order to give Zimmer more experience. When Robinson's protests to Lovett and Kruzel proved unavailing, Robinson took his complaint to their superior, division operations controller, Sheehan. Sheehan agreed with Robinson, and told Lovett and Kruzel to have Robinson finish out the week on the straight truck and then to return him to driving the tractor-trailer. After finishing off that week on the straight truck, Robinson was reassigned to the tractor-trailer, which he continuously drove until November 1988 (see infra fn. 10). In November 1988, Robinson received a wage increase of $1.45 an hour, retroactive to October 1988.[9] When he was advised of this increase, Sheehan told him, in Lovett's presence, that Robinson was receiving this increase partly because, rather than still performing the warehouse job he had been hired into in August 1987, he had successfully bid on the tractor-trailer job in late 1987. This increase was also based on his October 1988 performance rating, which was 4 on a scale of 1 (the lowest) to 5 (the highest).[10]

As previously noted, the Company had believed Robinson opposed the Union until November 9, 1988, when he wore to work a union hat which was the subject of a deprecatory scatological remark by Supervisor Lovett. Thereafter, Supervisor Kruzel, Lovett's subordinate, told Robinson that because Zimmer needed a large truck to carry the loads he was hauling, effective November 14 or 15, Zimmer was going to drive the tractor-trailer and Robinson was going to drive the straight truck. Robinson again complained to Sheehan, who again told him to finish out the week during the straight truck and then return to driving the tractor-trailer. Robinson

[8] Although other men also wore union hats in the facility, there is no evidence that anyone but Colangelo and Robinson was ever reproached therefor. Colangelo credibly testified that to his knowledge, nothing had happened to the others for wearing the hats. Then second-shift receiving Supervisor John Mulvey credibly testified that in November 1988 he saw an undisclosed number of employees wearing union hats, including at least some who were under him; that he never spoke to any of the employees about their wearing the hats; and that as far as he knew, the Company took no action against any of his employees with respect to their wearing hats. In November 1988, Mulvey did not supervise either Robinson or Colangelo.

[9] He also began receiving ''travel pay'' of $10 a week, apparently to compensate him for toll expenses incident to the May 1988 transfer of the facility from Hodgkins, Illinois, to Lansing, Illinois.

[10] My findings in this paragraph are based on Robinson's testimony. Because his testimony about the September 1988 incident is undisputed, and for demeanor reasons, I credit his related testimony regarding which truck he drove between September and November 1988, notwithstanding the testimony of Supervisor John Mulvey, who ceased being Robinson's immediate Supervisor in September or October 1988, that in October 1988 Zimmer regularly drove the tractor-trailer and Robinson regularly drove the straight truck. The Company offered into evidence the driving logs prepared by Robinson for Tuesday, November 1, and Monday, November 14, 1988, but no Robinson logs for the intervening period. However, the Company has not asked me to draw the inference, favorable to it and contrary to Robinson's direct testimony, that during this period Robinson worked in the warehouse. Cf. infra fn. 11.

finished off the week on the straight truck, and then resumed driving the tractor-trailer. However, 2 or 3 days later, Lovett told him that he was being taken off the tractor-trailer. Robinson said that this change had been revoked by Sheehan, who was Lovett's superior. Lovett said, ''It don't matter. That is the way it will be.''

Between the effective date of this change (that is, about November 25, 1988), and December 28, 1988, Robinson worked a total of about 24 days (a figure which consists of all weekdays). During this period, Robinson spent all or part of 8 days driving the straight truck or (less often) the tractor-trailer, and 16 full days working in the warehouse.[11] On about four occasions when Robinson was working in the warehouse, the straight truck was driven by employees Chung or Torres. Robinson took off Thursday and Friday, December 29 and 30, as vacation days. In January 1989, he resumed driving the tractor-trailer on a virtually full-time basis. Zimmer resigned between mid-March and early April 1989.

The November 1988 change in duties did not decrease Robinson's wage rate. When his successful bid on the truck-driver's job caused his transfer from warehouse work to truckdriving in November or December 1987, Robinson had told Lovett and Warehouse Manager Lewis that Robinson ''was really glad they put trucks in there because [he] would rather drive the truck than work inside.''

D. *The Alleged Unlawful Unilateral Actions*

1. The wage increases

Since at least 1985, the Company has had a practice of giving hourly employees individual annual wage reviews whose results affect the size of the wage increase which each reviewed employee will receive. Each employee is rated with respect to the preceding year on a scale of 1 (lowest) to 5 (highest) based on knowledge of work, quality of work, quantity of work, judgment, and human relations skills.[12]

The Company does business in 12 different States divided into 4 different regions. On August 8, 1988, 3 days after the Union's certification with respect to the Lansing facility, corporate compensation manager, Carl Giroux, who operates out of the corporate headquarters in Detroit, Michigan, sent a memorandum to all division and department heads which instructed them to return to the Company's department of human resources, by September 6, 1988, a written performance appraisal for each employee who had been hired prior to August 1, 1988, and had not received a review since the end of April 1988. The memorandum stated that before a performance appraisal was discussed with the individual employee, it was to be reviewed and signed by his immediate supervisor and the department manager. Further, the memorandum specified the approximate percentage of the employees who should receive each of the 5 performance-rating scores. The memorandum went on to say, ''This year's merit increase guidelines are being developed and will be announced in the near future. The guidelines will be based on the Company's financial performance as well as a review of salary surveys of other companies in the retail industry.'' Attached to this August 8 memorandum to the division and department heads was a memorandum from Giroux, dated August 11, which the August 8 memorandum said was to be distributed to all eligible employees with their paychecks that week, and which (inferentially) was in fact so distributed. This memorandum stated, inter alia:

> [A] decision has been made to change the Annual Performance Appraisal/Merit Review cycle. we are therefore pleased to announce that the effective date of any merit increases is being advanced by one and one half months this year. This increase will be an annual, 12-month increase even though it will cover only 10-1/2 months of performance.
>
> . . . .
>
> The size of your annual increase, if warranted, will be determined by several factors:
>
> 1. Individual job performance as evaluated on your Performance Appraisal.
> 2. The employee's current rate of pay.
> 3. The date an employee last received an increase and the amount of that increase.
> 4. The overall merit pay guidelines which are based on the Company's profitability and salary survey results of other retail companies.

A memorandum dated September 8, 1988, from Giroux to all corporate and division department heads, enclosed a list of each addressee's hourly paid subordinates who ''may be considered for a pay increase.'' The memorandum stated, inter alia:

> Current Pay Rate—Those individuals with one asterisk (*) next to their rate are presently ''low'' compared with the marketplace and should be considered for an above average pay increase. Those individuals with two asterisks (**) next to their rate are paid ''high'' compared to the market and should be considered accordingly for a below average increase. Any employee with no asterisks next to their rate are within the pay range established by the market for their job. A ''Not Eligible'' message means the person was hired after July 31st of this year and, therefore, will not receive a regular merit increase at this time.
>
> Due to the one-month advance this year in the merit review cycle for non-exempt employees, a *one-time exception* 90-day merit pay review will be granted for those individuals hired between August 1st through August 31st.

After directing the recipients of the memorandum to submit to the Human Resources Department by September 22, 1988, information which included a recommended increase (if any) for each employee (''All increases should be to the nearest five cents''), the memorandum stated:

> Note: The ''Totals'' at the bottom of the sheet represent the budget guidelines each manager *must* adhere to. Since the ''Percent Increase'' for this year is 4.5%, employees within the department may be recommended

[11] More specifically: each weekday between Monday, November 28, and Wednesday, December 7, inclusive; Friday, December 9; Thursday, December 15; and Tuesday, December 20, through Tuesday, December 27. This finding is based on the Company's failure to produce for these 16 days the report which a driver is required to provide each day, and on Robinson's testimony that he worked in the warehouse when not driving a truck.

[12] Copies of the performance appraisal form used in 1987 are included in the representation case record.

for various percentage increases, but the total must equal the 4.5%. The same procedure applies to the other totals for the ‘‘Proposed Increase Amount’’ and ‘‘Proposed Pay Rate.’’

[a]ny increase amount should be based on:

(1) The employee’s job performance as reflected in the ‘‘Overall Rating’’ shown on their performance appraisal.*

(2) The individual’s current pay rate and whether it is ‘‘low,’’ ‘‘high,’’ or within the range established by the market rate typically paid for the job.

(3) The date the employee last received an increase.

(4) The overall merit pay budget established for your department.

* The following guidelines should be used when recommending a specific increase amount dependent on the employee’s ‘‘Overall Rating’’

Far Exceeds Requirements–(5), substantial increase above the average amount.

Exceeds Requirements–(4), slightly above average increase.

Meets All Requirements–(3), average increase.

Partially Meets Requirements–(2), no increase or minimal amount.

Fails to Meet Requirements–(1), no increase warranted.

Human Resources Manager Andre testified that the Lansing personnel who shared responsibility for determining the appraisal scores were free to make any determination within the appraisal scale. He further testified that the 1988 merit review process was advanced 1 month from previous years. Andre testified that Detroit-based Board Chairman Mondry examines the proposed wage increases to see whether they are within the corporate budget for wage increases for any given budget cycle, but beyond that plays no role in determining what, if any, wage increase is received by any employee at the Lansing facility.

Effective October 2, 1988, bargaining unit employees received or failed to receive wage increases on the basis of the policies reflected in the foregoing memoranda. Leader Frank Colangelo, who began to work for the Company in August 1985, testified in October 1989 that the Company ‘‘historically usually discussed your raise . . . usually always almost about October. October, November, late September, depending on how things worked. But it was somewhere around that point in time. They would discuss the raise with me and then actually put it down on paper,’’ retroactively ‘‘if they had lost a month . . . in the paperwork.’’ Employee Robinson, who began to work for the Company in August 1987, testified in October 1989 that ‘‘in October they will usually have a pay increase,’’ and that this had happened the 1 year he had been there prior to October 1988.

The Company took the action described under this heading without giving the Union prior notice and an opportunity to bargain about it or its effects.

2. Elimination of the third shift

Paragraph X(b)(d) of the complaint in Case 13–CA–28116 alleges, inter alia, that in October 1988, more than a month after the Union’s certification, the Company eliminated the third shift, without prior notice to the Union and without having afforded the Union an opportunity to negotiate with respect to such conduct or its effects. These allegations are admitted in the Company’s answer. Company counsel admitted at the hearing that the conduct described in the complaint was a mandatory subject of collective bargaining. The elimination of the third shift resulted in the elimination of the leader’s position then held by Powell. Because he disliked the work schedule and/or the duties attached to the only leader’s job which he could have obtained by bid, he bid for and received a downgrade in position, back to a forklift operator, the job he had held before being promoted to leader.

3. Alleged reduction of overtime for leaders

Before early October 1988, Respondent was operating three shifts. Beginning about June 1, 1988, the Company’s leaders all worked 8 hours a day, Monday through Friday. In addition, they took turns working on Saturday, for which they were paid at an overtime rate.[13]

About early September, the Company decided to try cutting back on the amount of overtime paid, while at the same time continuing to maintain Saturday coverage. Accordingly, the Company required the leaders to take a weekday off during the week they worked on Saturday, and thereby to lose entitlement to overtime for a sixth day worked during the week.[14] Of the six leaders, the exhibits include payroll records for four during the entire period beginning June 1, 1988, and ending September 17, 1988. A comparison between the overtime worked for the portions of September covered by this period and the average overtime worked for about the same length of time in June, July, and August shows that the September 1–17 overtime worked by Colangelo and Grando was about a third of the prior average and the September 1–17 overtime worked by Brod was about a seventh of the prior average. Moreover, Kulikowski worked no overtime at all between September 1 and 17, although his prior overtime for about the same length of time between June 1 and August 31 averaged about 27 hours. Further, although the pre-September overtime records of Balmes and Powell are incomplete, Balmes’ September 1–17 overtime was about 11 percent of the overtime he worked during June 1988 and about 13 percent of the overtime he worked during August 1988; and Powell’s September 1–17 overtime was about 3 percent of the overtime he worked during July 1988 and about 4 percent of the overtime he worked during August 1988.

Colangelo testified that the previously mentioned change in the prior Monday to Friday schedule was in effect for 2 months to ‘‘possibly’’ 10 weeks–that is, until about the second week in November 1988. Powell testified that this

[13] My findings as to the leaders’ work schedule as of June 1, 1988, are based on the Company’s records and first-shift leader Frank Colangelo’s testimony. Lovett’s testimony at the representation case hearing, which was held on May 4, 1988, indicates that at that time, the two second-shift leaders each worked 5 days a week, and alternated in working Wednesdays and working Saturdays.

[14] This finding is based on the testimony of Frank Colangelo and Powell (the two first-shift leaders in October 1988), the Company’s payroll records, and inferences therefrom. Although Powell and Colangelo were asked about only their own schedules, the Company’s payroll records show that the overtime for all leaders simultaneously diminished. Powell’s testimony, standing alone, suggests that during September 1988 he regularly worked Tuesday through Saturday. Although I believe Colangelo’s memory to be more reliable, there is no materiality to any inconsistency between them as to whether leaders were rotating schedules during this period.

change in the schedule was in effect until the end of September 1988; but elsewhere testified, in effect, that the new schedule was still being observed in early October 1988. None of the leaders worked as much overtime in either the period between September 18 and October 14 or the period between October 15 and November 12 as he had averaged before September 1; indeed, 3 of them (Grando, Balmes, and Brod) did not work during either month of the latter period as much overtime as he had worked in any month of the prior period.[15] In view of these records, the fact that Powell was not a leader after September, and demeanor considerations, as to the length of the schedule change I credit Colangelo.

The Company took the action summarized under this heading without giving the Union prior notice and an opportunity to bargain about the changes and their effects.

4. Alleged change in system for assigning overtime

Before October 20, 1988, the Company offered overtime work in the order of the employees' seniority. If no or too few employees volunteered for such overtime work, the Company assigned the work to the needed number of employees beginning from the bottom of the seniority list, and these junior employees were required to work the overtime. Management would on occasion reveal the need for overtime work only a short time before the end of the regular workday, and some employees would thereupon reject it because of prior commitments.

Admittedly because of the Company's problems with employees' not wanting to work overtime, then Regional Operations Manager Terry Dickson issued to his supervisory staff a memorandum, dated October 20, 1988 (more than 2 months after the Union's certification), which read in part as follows:

> This memo is to restate our overtime policy for the warehouse:
>
> (1) Wherever possible, overtime should be anticipated, scheduled and the employees given an advance notice of at least *24 hours*. If they are given 24 hours notice then they are expected to work the overtime.
>
> (2) If, due to unexpected circumstances, overtime is needed and 24 hour notice can not be given, then overtime becomes voluntary. Employees can refuse the overtime and we as management should take alternative action.
>
> (3) Every [Friday], employees should be given a schedule of the hours they will be expected to work for the upcoming week. Any overtime you anticipate your shift to work should be built into that schedule.
>
> (4) Overtime should be offered or planned so that no one individual or group of employees gets more overtime than another. The goal is to distribute the overtime in a uniformed [sic] fashion.

This policy was announced to the employees by Supervisor Lovett and, inferentially, by the other supervisors. The Company admitted at the hearing that whatever change (if any) was effected by it with respect to its overtime policy, that change was effected without giving notice to the Union.

[15] Although this is also true of Powell, he was not a leader after September.

My findings as to Company's practice before October 20, 1988, are based on credible parts of the testimony of leader Frank Colangelo and Operations Manager Dickson before me, and on leader Balmes' testimony at the representation case hearing. Colangelo's generalized testimony that ''the only real change'' was that the Company ''went to an actual posted schedule'' fails to square with his specific and credible testimony as to the preposting system of selecting who was to work overtime; that before the posting, ''Overtime was a voluntary thing'' for senior employees; and that after the posting, Supervisor Lovett told him ''now'' the 24-hour notice gave employees enough time to accommodate their private lives to the overtime assignment. In view of Dickson's credible testimony that the October 23 notice was posted because the Company was ''having problems with the people not wanting to work overtime . . . so [the supervisors] had a clearer notion of what notice they needed to give people,'' and for demeanor reasons, I do not credit his testimony that the document did not reflect a change in policy or practice.

5. Alleged change in discipline for smoking

Before mid-May 1988, part of the Company's warehouse facility later moved to Lansing which was located in Hodgkins, Illinois. Employee Powell, who was hired as a material handler in Hodgkins about June 1985, credibly testified that 2 weeks after he started to work for the Company, then Warehouse Manager Joe Rimirez told him that once the warehouse started receiving freight, the employees would not be permitted to smoke. Powell further credibly testified that thereafter, while Rimirez was still warehouse manager, the Company issued a memo clearly stating that there would be no smoking in the warehouse, and mentioning that disciplinary action would be taken. Powell went on to give credible testimony that some time in 1986, this memo was ''reissued'' by Lewis, who had replaced Rimirez as warehouse manager. Powell further credibly testified that before December 1988, the Company's rules with respect to smoking in the warehouse called for disciplinary action up to and including discharge, with writeups and suspensions, and with discharge for multiple cases. He went on to give credible testimony that before December 1988, the discipline which had in fact been imposed for smoking in the warehouse included writeups and suspensions, but that so far as he knew, nobody had been terminated for smoking. Tidwell, who since December 1985 has been a company employee under the warehouse manager, credibly testified that at Hodgkins, an employee would be terminated if he received three reprimands a year for smoking. Frank Colangelo, a company employee since August 1985, credibly testified that when he first started, ''somebody said there is no smoking in the warehouse.'' He further credibly testified that on a date which he initially put as ''shortly'' after he ''first began'' in August 1985 and later put as about October 1987, Respondent distributed among the employees a ''piece of paper'' that smoking in the warehouse was subject to termination. Colangelo testified at the May 1988 representation case hearing that in August 1987, at the request of his supervisor (probably then Warehouse Manager Lewis), Colangelo issued a written reprimand, for smoking in an unauthorized area, to an employee after he had received one or two ''verbal warnings'' for that offense. According to such testimony by Colangelo, the supervisor told him to submit ‘‘a written formal warning . . . so that we could have [the employee] stop smoking in the nonsmoking area or ultimately get dismissed. The written warning in question states that the employee had previously been given a ‘‘verbal warning’’ and states, ‘‘Should employee fail to heed written warning he is subject to suspension and or dismissal.’’ Human Resources Director Andre credibly testified that after goods began to be stored at the Hodgkins warehouse, smoking had been forbidden in the warehouse.

Andre credibly testified that about July 1988, Respondent distributed to all Lansing employees a memorandum (dated June 22, 1988) which set forth a rule prohibiting smoking in all areas except the lunchrooms.[16] Employee Tidwell testified on direct examination that in July 1988, Supervisor Kruzel gave him a form to sign, ‘‘saying we were aware of [a rule against smoking in the warehouse]. And if we are caught smoking we can be terminated for it.’’ Still on direct examination, Tidwell testified that he signed a copy of this rule; and that some employees signed it and others did not. On cross-examination, he testified that the June 22, 1988 rule, stapled to a legal pad, was the rule which he had been given when he signed the legal pad to show that he had seen the policy. The June 1988 rule contains no provisions regarding discipline for violations. Tidwell, a lift-truck operator, credibly testified that after receiving this memo in July 1988, he received no other documents concerning smoking in the warehouse; but that in December 1988 his supervisors ‘‘reinformed’’ him and other employees about the policy.

Employee Powell credibly testified that in December 1988, when he was a forklift operator, Supervisor Kruzel gave him a memo, issued in December 1988 (after the Union’s certification), which stated that an employee would be ‘‘automatically terminated’’ if he was caught smoking in the warehouse. Powell went on to give credible testimony that Kruzel ordered him to sign the memo, stating that Powell had in fact seen the memo and would comply.

The Company took the action described under this heading, with respect to how employees were to be disciplined for violating restrictions on smoking, without giving the Union prior notice and an opportunity to bargain about it.

E. *Analysis and Conclusions*

1. The alleged rule forbidding discussion of wages with other employees

An employer violates Section 8(a)(1) of the Act by forbidding employees to discuss wages with other employees. *Jeannette Corp*., 217 NLRB 653, 656 (1975), enfd. 532 F.2d 916 (3d Cir. 1976); *Super One Foods, No. 601*, 294 NLRB 462 (1989); *Independent Stations Co*., 284 NLRB 394, 396–397 (1987); *A.L.S.A.C.*, 277 NLRB 1532, 1533–1534 (1986); *Electronic Data Systems*, 278 NLRB 125, 129–130 (1986); *Apparatus Service*, 296 NLRB 581 (1989). Such a prohibition is unlawful if expressed orally, even though it is not reduced to writing. *Jeannette*, supra; *Triana Industries*, 245 NLRB 1258 (1979); *Scientific-Atlanta, Inc*., 278 NLRB 622, 624–625 (1986); *W. R. Grace Co*., 240 NLRB 813, 815–816 (1979). The uncontradicted evidence shows that in October and November 1988, members of management told various employees not to discuss their wages with other employees (see supra part II,B). These statements, made within the limitations period imposed by Section 10(b) of the Act, repeated similar oral and written statements between October 1986 and January 1988 (see supra part II,B). Accordingly, I conclude that by maintaining such a prohibition, the Company violated Section 8(a)(1) of the Act.

Because this prohibition was reiterated by Lansing (Illinois)-based members of management (Sheehan and Lovett) in October and November 1988, their statements were not cured by the prior, June 1988 statement to employees by the Detroit (Michigan)-based chairman of the Company’s board of directors, in Supervisor Lovett’s presence, that there was no policy against employees’ talking among themselves about their wages. See *EPE, Inc*., 284 NLRB 191, fn. 2 (1987), enfd. in material part 845 F.2d 483 (4th Cir. 1988); *Graves Trucking v. NLRB*, 692 F.2d 470, 474 (7th Cir. 1982). Indeed, I note Human Resources Director Andre’s testimony, in effect, that Mondry would not necessarily know about such a policy followed at an individual facility—testimony corroborated by Mondry’s statement to the employees that he was unaware of the prior memos forbidding wage discussions.

2. The allegedly unlawful 8(a)(1) conduct with respect to the leaders

The evidence shows that on November 9, 1988, Supervisor Lovett told leader Frank Colangelo that it was wrong for him to wear a hat with a union logo on it, that ‘‘the boys upstairs are going to remember’’ Colangelo’s hat, that he was going to have serious problems if the Union ‘‘doesn’t make it in,’’ that he was hurting himself, and that it was in his best interest to take it off. The evidence further shows that on the same day, after leader Grando had visited the union picket line notwithstanding Lovett’s statement that he did not think it was a good idea for Grando to go out there, Lovett asked Grando what the Union had to say; and that when he replied that the Union was thinking about picketing and boycotting the Lansing store, Lovett said that the the Union had in fact boycotted the store but had ‘‘got chased away by the cops.’’

As the Company does not appear to dispute, the remarks made by Supervisor Lovett in connection with the union hat violated Section 8(a)(1) of the Act if directed to an admitted employee. *Mack’s Supermarkets*, 288 NLRB 1082 (1988). Further, the Company does not appear to dispute that if directed to an admitted employee, the question directed to Grando by Supervisor Lovett violated Section 8(a)(1). I so find, in view of Lovett’s prior statement to Grando that it was not a good idea for Grando to go out to the picket line where he engaged in the union conversations Lovett later asked him about, Lovett’s almost certainly erroneous implication to Grando that the Union’s boycotting plans were unlawful,[17] the Company’s subsequent reprisals against employee Robinson because of his union activity (see infra part II, F,3), the absence of any assurances against company reprisals for the boycotting and picketing which the Union was at least reportedly considering, and the absence of any

[16] However, Colangelo testified that he could not recall any posting or distribution of any documents about this subject between October 1987 (at the latest) and December 1988. Similarly, Powell testified that he could recall no memos about smoking between sometime in 1986 and December 1988.

[17] See *Mountain Country Food Store*, 292 NLRB 967 (1989).

claimed or apparent legitimate purpose for the questioning. See *Synergy Gas Corp.*, 290 NLRB 900 (1988).

The Company contends that the foregoing conduct with respect to leaders Colangelo and Grando did not violate the Act because they were statutory supervisors. As previously noted, the Board held otherwise in the representation proceeding. Accordingly, and because as to their status the Company offered no evidence before me, I am constrained to make a similar finding in the case at bar.[18]

The Company further contends that its conduct with respect to leaders Colangelo and Grando did not violate the Act because the Company allegedly entertained a good-faith belief that they were supervisors. In so contending, the Company relies on *Pillows of California*, 207 NLRB 368, 372 (1973). In the circumstances of this case, I reject this defense. To the extent that Pillows may rest on the view that the interests of thus wronged de facto employees are outweighed by equities which their employer's misapprehension of their status may have afforded him, such employer equities did not survive the Board's decision, more than 3 months before the employer remarks attacked in the complaint, that Colangelo and Grando were in fact statutory employees.[19] Further, the employer's conduct in *Pillows* had a legitimate purpose—namely, ascertaining whether the prounion activities of the supposed supervisor were sufficient to provide a basis for seeking dismissal of the Union's representation petition.[20] No such legitimate purpose existed for Supervisor Lovett's interrogation of Grando as to what the Union had to say at the picket line.[21] As to Lovett's statement to Colangelo that he should remove his union cap, the Company's only even arguably legitimate interest (more than 3 months after the election, where Colangelo's hat-wearing might have affected the results) was the Company's bare prerogative of forbidding such conduct by supervisors. A need for more than that interest is indicated by the cases cited supra, footnote 21. Finally, the *Pillows* interrogation was prefaced by an explanation of the reasons therefor and by a statement that the employee did not have to answer her supervisor's questions and would not be subject to reprisals if she refused to reply. No such statements were made to Grando.

For the foregoing reasons, I find that the Company violated Section 8(a)(1) of the Act by telling Colangelo to remove his union cap and by interrogating Grando about what the Union said on the picket line.

In the General Counsel's posthearing brief, he contends for the first time that the Company further violated Section 8(a)(1) when Lovett, in response to Grando's inquiry about whether he could go down to the picket line and see what was going on, said no, Lovett did not think it was a good idea for Grando to go out there. I agree with the General Counsel that the issue thus presented was fully litigated, in view of its relevance to the legality of the interrogation alleged in the complaint and the absence of any record evidence inconsistent with Grando's credited version of the conversation. See *Sunbeam Corp.*, 287 NLRB 996 fn. 8 (1988). In addition, I agree with the General Counsel that this remark violated Section 8(a)(1) because the remark constituted a threat of possible, unspecified reprisals if Grando exercised his statutory right to discuss with the pickets during his lunch hour what was happening on the picket line.

3. The allegedly unlawful change in duties and transfer of employee Robinson

In March or April 1988, about the time that the Union filed its petition, Supervisor Lovett told truckdriver Robinson that ''We got to get this Union out of here,'' because if the Union got in, the Company would get rid of the trucks and there would be no more drivers' jobs. At some time before the June 1988 representation election, Robinson volunteered to Human Resources Director Andre that Robinson had been in other unions before, did not agree with them, did not like them, and did not want to have any part of them. Thereafter, in September 1988, Lovett and Kruzel told Robinson that in order to give employee Zimmer experience on the tractor-trailer, he was being temporarily transferred to the tractor-trailer ordinarily driven by Robinson and Robinson was being temporarily transferred to the straight truck ordinarily driven by Zimmer. However, when Robinson complained to Division Operations Controller Sheehan about the switch, Sheehan told Lovett and Kruzell to rescind the switch after the end of the week. Robinson thereafter continued to drive the tractor-trailer, and Zimmer continued to drive the straight truck, until November 1988.

Andre testified that at least after Robinson's preelection remarks to Andre evincing dislike of unions, the Company viewed Robinson as a ''no vote in the union situation.'' However, on November 9, 1988, about 4 months after the election, Robinson wore a union hat to work, and this hat was the subject of a deprecatory scatological remark by Supervisor Lovett. A few days later, Supervisor Kruzel, Lovett's subordinate, told Robinson that effective November 14 or 15 Zimmer was again going to be transferred from the straight truck to the tractor-trailer and Robinson was again going to be transferred to the straight truck. When Robinson once again complained to Sheehan, Sheehan initially revoked the transfer again. However, a few days later, Lovett once again told Robinson that he was being taken off the tractor-trailer notwithstanding Sheehan's action. Thereafter, and until January 1989, Robinson worked mostly in the warehouse, and such driving as he did perform was performed mostly with the straight truck. Effective about a month before his changed assignments, Robinson had received a wage increase of $1.45 an hour partly because he was driving the tractor-trailer rather than working in the warehouse. However, in December 1987 he had told Lovett that he preferred driving to inside work. The Company's contention that it assigned the tractor-trailer to Zimmer because the loads Zimmer was hauling were too heavy for the straight truck he had been driving fails to explain why the duties in connection with the tractor-trailer deliveries of heavier loads were assigned to Zimmer and not to Robinson. The contention that Zimmer was better than Robinson at the duties which Zimmer per-

[18] See *O'Hare-Midway Limousine Service*, 295 NLRB 463 (1989); *American Tempering*, 296 NLRB 699 (1989); *Serv-U-Stores*, 234 NLRB 1143, 1144 (1978); *Stanley Works*, 171 NLRB 388, 389–390 (1968), enfd. 432 F.2d 358 (6th Cir. 1970), cert. denied 402 U.S. 908 (1971). The Company has made no effort before me to relitigate the status of leaders for any purpose.

[19] Cf. *Permanent Label Corp.*, 248 NLRB 118 fn. 2, 133–136 (1980), enfd. 657 F.2d 512 (3d Cir. 1981), cert. denied 455 U.S. 940 (1982).

[20] Cf. *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

[21] See *Dependable Lists*, 239 NLRB 1304, 1305 (1979); *Campbell Soup Co.*, 225 NLRB 222, 226 (1976); *Concrete Technology*, 224 NLRB 961, 962 fn. 6 (1976).

formed while using the tractor-trailer is not advanced by the Company, and would be belied by Sheehan's willingness to return Robinson to the tractor-trailer and by Robinson's prior performance of Zimmer's duties in connection with straight-truck deliveries for several days in September 1988. Nor is there any evidence that Zimmer shared Robinson's preference for driving the tractor-trailer or his dislike of inside work.

The foregoing evidence shows, at least prima facie, that Respondent transferred Robinson and changed his duties, from driving the tractor-trailer to working in the warehouse and driving the straight truck, at least in part because, by wearing a union hat, he revealed his union sympathies to the Company for the first time. Accordingly, a finding of unlawful transfer and change must be made unless the Company can show, by a preponderance of the evidence, that such action would have been taken even absent Robinson's protected conduct. *NLRB v. Del Rey Tortilleria*, 787 F.2d 1118, 1123 (7th Cir. 1986); *NLRB v. Rain-Ware*, 732 F.2d 1349, 1353 (7th Cir. 1984); *NLRB v. Bishopric Products Co.*, 777 F.2d 1119, 1121 (6th Cir. 1985); *NLRB v. Health Care Logistics*, 784 F.2d 232, 235–237 (6th Cir. 1986). My finding that the reasons given by the Company for the transfer and change were pretextual necessarily means that the reasons advanced by the Company either did not exist or were not in fact relied on, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Springfield Manor*, 295 NLRB 17 fn. 2 (1989); see also *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 116 (6th Cir. 1987). Accordingly, I find that by changing the job duties of and transferring employee Robinson in November 1988, Respondent violated Section 8(a)(1) and (3) of the Act.

4. The alleged unlawful unilateral action

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act by effecting changes with respect to mandatory subjects of collective bargaining without giving the statutory representative of the affected employees prior notice and an opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736, 747–748 (1962). Although the Company contends that the Union here never was the statutory representative of the Company's employees, and that the certification was improperly issued, in the instant proceeding I am required to accept the validity of the certification.[22] Further, the Company errs in contending that even assuming the validity of the Union's June 1988 election victory and August 1988 certification, the duty to refrain from unilateral action did not arise until the Board's refusal in February 1989 (after the alleged unilateral changes attacked in the complaint) to review the Regional Director's August 1988 action in overruling the Company's objections and certifying the Union. Rather, the Company's duty to refrain from unilateral action arose when the Union's majority status was shown in June 1988 by the tally of ballots which led to the Union's certification in August 1988, before the alleged unilateral changes. *NLRB v. Allied Products Corp.*, 548 F.2d 644, 653 (6th Cir. 1977); *NLRB v. McCann Steel Co.*, 448 F.2d 277, 279 (6th Cir. 1971); *Westinghouse*, supra, 849 F.2d at 20–22, 285 NLRB at 212–213.

The complaint in Case 13–CA–28816 alleges, inter alia, that in early October 1988 the Company eliminated the third shift, without giving the Union prior notice and an opportunity to bargain with respect to such conduct and its effects. Further, company counsel stated at the hearing that he did not deny that the elimination of the third shift was a mandatory subject of collective bargaining. See *San Antonio Portland Cement Co.*, 277 NLRB 338 (1985). Moreover, it is undenied that because the third shift was eliminated, leader Powell was compelled to choose between being downgraded (as he was) or working on a leader's job with a schedule and/or duties which he disliked. Accordingly, I find that the Company violated Section 8(a)(5) and (1) of the Act by eliminating the third shift without giving the Union prior notice and an opportunity to bargain about such conduct and its effects.

The uncontradicted evidence shows that before December 1988, as to breaches of the company rules against smoking in the warehouse and certain other areas, the Company articulated and followed the policy of imposing discipline which sometimes consisted of oral warnings, sometimes consisted of written warnings, sometimes consisted of suspensions, and sometimes consisted of discharge. It is uncontradicted that in December 1988, after the Union's certification, the Company advised the employees that an employee who was caught smoking in the warehouse would be ''automatically terminated.'' In view of the earlier possible alternatives ranging down to a mere oral warning, I disagree with the Company that such a rule merely constitute a restatement of the prior rule that discharge was ''always a possible punishment.'' See *Electri-Flex Co.*, 228 NLRB 847, 855–857 (1977), enfd. 570 F.2d 1327, 1332–1333 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978); *Adair Standish Corp.*, 290 NLRB 317 (1988); *Migali Industries*, 285 NLRB 820 (1987). Accordingly, I find that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the discipline imposed on employees for violating the Company's no-smoking policy.

Prior to October 20, 1988, the Company offered overtime in the order of the employees' seniority. If no or too few employees volunteered for such overtime work, the Company assigned the work to the needed number of employees beginning from the bottom of the seniority list, and these junior employees were required to work the overtime. Moreover, on occasion employees would refuse, because of prior commitments, overtime which was scheduled at very short notice. The Company's brief correctly points out that on October 20, 1989, the Company announced a new policy of giving employees at least 24 hours' advance notice of overtime. However, the wording of the October 20 memo which the Company issued to the employees about overtime belies the Company's contention that the only change made was from oral scheduling to written scheduling. Rather, the memo stated that overtime which was scheduled more than 24 hours in advance would be mandatory for all employees assigned thereto, and that overtime would be distributed as evenly as possible. Accordingly, I find that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing overtime assignments from voluntary to mandatory, without giving the Union prior notice and an opportunity to bargain

[22] *McCullough Environmental Services*, 297 NLRB 546 (1990); *Westinghouse Broadcasting*, 285 NLRB 205, 212 (1987), enfd. 849 F.2d 15 (1st Cir. 1988); *Allis-Chalmers Corp.*, 286 NLRB 219, 223–224 (1987). As previously noted, the validity of the certification is now being litigated before the United States Court of Appeals for the Sixth Circuit.

about the change. *Wellman Industries*, 248 NLRB 325, 339 (1980).[23]

In addition, I find that the Company violated Section 8(a)(5) and (1) of the Act when, admittedly without giving the Union prior notice and an opportunity to bargain, the Company put into effect at the Lansing, Illinois facility the October 1988 wage increases. The size of such increases was determined partly by the discretionary determination of the Company's Detroit management as to the total dollar amount of wage increases which could be granted by the Company's Lansing, Illinois management; by Detroit management's discretionary determination as to how this total amount was to be divided among the respective departments; by Detroit management's discretionary determination as to which job classifications were to receive particularly large (because Detroit management believed them to be paid less than the market rate) or particularly small (because Detroit management believed them to be paid more than the market rate); and by Detroit management's discretionary determination as to the ''curve'' on which performance rating scores should be given, and as to which increases should be given within each job classification. In view of the foregoing, the increases in question were ''in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.'' *Katz*, supra, 369 U.S. at 746–747; *Oneita Knitting Mills*, 205 NLRB 500 (1973); *Specialty Steel Treating*, 279 NLRB 670 (1986); *Advertiser's Mfg. Co*., 280 NLRB 1185, 1195–1196 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987); *M. A. Harrison Mfg. Co*., 253 NLRB 675, 681 (1980), enfd. 682 F.2d 580 (6th Cir. 1982). I note, moreover, that in 1988 the Company changed the dates on which it had previously conducted wage reviews and granted wage increases, thereby reducing from 12 to 10-1/2 months the performance period covered by the appraisals and causing the Company to give to employees hired during August 1988, merit appraisals which they would not have received in 1987 if hired during August 1987. The Company errs in relying on *NLRB v. Patent Trader*, 415 F.2d 190, 199–200 (2d Cir. 1969), modified 426 F.2d 791 (2d Cir. 1970); in *Patent Trader*, the wage increases were given pursuant to normal company policy while the employer was negotiating with the bargaining representative, which knew about them but did not protest either the increases or the employer's general practice of periodic wage increases. See *Peelle Co*., 289 NLRB 113 fn. 4 (1988).

In addition, I find that the Company violated Section 8(a)(5) and (1) when the Company, without giving the Union prior notice and an opportunity to bargain, abandoned the practice of scheduling leaders to work Monday through Friday, a schedule which entitled them to overtime for Saturday when they were required to work on that day as well; and, instead, required leaders who were scheduled to work on Saturday to take a day off during the week, a schedule which entitled them to straight time only. I find that this change constituted a mandatory subject of collective bargaining. *Rocky Mountain Hospital*, 289 NLRB 1370 (1988); *American Oil Co*., 238 NLRB 294 (1978), enfd. 602 F.2d 184 (8th Cir. 1979); *Distribution Services West*, 262 NLRB 764, 774 (1982); *Rahco, Inc*., 265 NLRB 235, 253–254 (1982); *Georgia Pacific Corp*., 275 NLRB 67 (1985); see also *S. S Kresge Co. v. NLRB*, 416 F.2d 1225, 1230 fn. 8 (6th Cir. 1969). No different result is suggested by *Kal-Die Casting Corp*., 221 NLRB 1068 (1975), relied on by the Company, where the employer was in fact recognizing the employees' bargaining representative and there was no evidence that the employer's production scheduling and adjustments relating to diminishing hours of work varied from the employer's past practice or that the union, which the employer recognized after its certification, at any time attempted to broach those issues with the employer. In the instant case, the Company never recognized the Union and was limiting overtime by changing the Company's prior practice with respect to the weekday scheduling of leaders who worked on Saturdays.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Company has violated Section 8(a)(1) of the Act by forbidding employees to discuss their wages with each other; by threatening an employee with reprisals for wearing union insignia; by interrogating an employee as to what the Union had to say on a picket line; and by threatening an employee with reprisals for discussing with union pickets during his lunch hour what was happening on the picket line.
4. The Company has violated Section 8(a)(1) and (3) of the Act by changing the job duties of and transferring employee Nicholas Robinson.
5. The following employees of the Company constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehousemen and truck drivers, lead persons, janitors, and maintenance employees employed at the Company's facility currently located at 16801 Exchange Avenue, Lansing, Illinois; but excluding office clerical employees, service technician employees, guards, and supervisors as defined in the Act.

6. At all times since August 5, 1988, the date of the Union's certification, the Union by virtue of Section 9(a) of the Act has been the exclusive representative of the employees in the unit described in Conclusion of Law 5 for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.
7. The Company has violated Section 8(a)(5) and (1) of the Act by taking the following action without giving the Union prior notice and an opportunity to bargain:

   (a) Eliminating the third shift.

   (b) Changing its policy with respect to discipline for smoking in forbidden areas.

   (c) Changing overtime assignments from voluntary to mandatory.

[23] The relevant complaint does not allege that the Company violated the Act by changing its method of deciding which employees were to be assigned overtime.

(d) Putting the October 1988 wage increases into effect.

(e) Reducing the overtime of leaders.

8. The unfair labor practices set forth in Conclusions of Law 3–4 and 7 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has violated the Act in certain respects, I shall recommend that the Company be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act.

The Company will be required to rescind the rule forbidding discussion of wages with other employees. Because Robinson has been returned to the duties which he performed before the discrimination against him, no reinstatement order is required as to him. Although it seems unlikely that the discrimination against him caused him to suffer any monetary loss, as a precaution a make-whole order will issue as to him. Also, the Company will be required, on the Union's request, to (1) reinstitute the third shift; (2) as to the system for assigning overtime, return to the system in effect before October 20, 1988; (3) as to the discipline to be imposed for smoking in unauthorized areas, return to the system in effect before December 1988; and (4) rescind the unilateral wage increases granted in October and November 1988; but nothing in this Order is to be construed as requiring the Company to cancel any wage increase without a request from the Union. No rescission requirement is called for as to the unilateral changes with respect to leaders' overtime, because the Company has returned to its previous practice. Further, the Company will be required to offer, to any employees who may have been discharged for breach of the unlawful rule against discussion of wages or in consequence of the unilateral change in disciplinary policy for smoking or the unilateral change which rendered overtime mandatory instead of voluntary, and to any employee (including but not limited to Steven Powell), who may have been laid off or transferred in consequence of the unilateral discontinuance of the third shift, reinstatement to the jobs of which they were unlawfully deprived, or if such jobs no longer exist, substantially equivalent jobs, without prejudice to such employees' seniority or any other rights and privileges previously enjoyed. In addition, the Company will be required to make employees (including but not limited to Steven Powell) whole for any loss of pay they may have suffered by reason of the Company's unilateral discontinuance of the third shift, and to make employees whole for any loss of pay they may have suffered by reason of discharge or other discipline for breach of the unlawful rule against discussion of wages, or by reason of the Company's unilateral changes with respect to discipline for smoking, making overtime assignments mandatory instead of voluntary and reducing the overtime for leaders. All sums due under this Order shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Loss of pay due to separation from employment is to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950).

In addition, the Company will be required to expunge from its files any reference to any discipline for discussing wages with other employees, and to any discharge due to the unilateral change in disciplinary policy for smoking in unauthorized areas. Finally, the Company will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Highland Superstores, Inc., Lansing, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Forbidding employees to discuss wages with each other.

(b) Threatening employees with reprisals for wearing union insignia or for engaging on such employees' own time in discussions with union pickets on a picket line.

(c) Interrogating employees about protected activity in a manner constituting interference, restraint, or coercion.

(d) Discouraging membership in Highway Drivers, Dockmen, Spotters, Rampmen, Meat Packinghouse and Allied Products Drivers, Helpers and Office Workers and Miscellaneous Employees, Local 710, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or any other labor organization, by transferring them, changing their job duties, or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(e) Making changes with respect to number of shifts, disciplinary policy, whether employees are required to accept overtime assignments, wages, amount of overtime, or any other mandatory subjects of collective bargaining, regarding the following unit for collective bargaining, without giving Local 710 prior notice and an opportunity to bargain:

> All full-time and regular part-time warehousemen and truck drivers, lead persons, janitors and maintenance employees employed at Respondent's facility currently located at 16801 Exchange Avenue, Lansing, Illinois, but excluding office clerical employees, service technician employees, guards and supervisors as defined in the Act.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by Local 710, (1) reinstitute the third shift; (2) as to the system for assigning overtime, return to the system in effect before October 20, 1988; (3) as to the discipline to be imposed for smoking in unauthorized areas, return to the system in effect before December 1988; and (4) rescind the unilateral wage increases granted in October and November 1988; but nothing in this Order is to be construed as requiring Respondent to cancel any wage increase without a request from Local 710.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and become its findings, conclusions, and Order, and all objections to them shall be deemed waived for all purposes.

(b) Offer to any employees who may have been discharged for breach of the unlawful rule against discussing wages with other employees, or in consequence of the unilateral change in disciplinary policy for smoking or the unilateral change which rendered overtime mandatory instead of voluntary, and to any employees (including but not limited to Steven Powell) who were laid off or transferred in consequence of the unilateral discontinuance of the third shift, reinstatement to the jobs of which they were unlawfully deprived, or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to such employees' seniority or any other rights and privileges previously enjoyed.

(c) Make Nicholas Robinson whole for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the remedy part of this decision.

(d) Make employees whole for any loss of pay they may have suffered by reason of discharge or other discipline for breach of the unlawful rule forbidding discussion of salaries with other employees, or by reason of the unilateral change which rendered overtime mandatory instead of voluntary, or by reason of the unilateral change in the system of discipline for smoking in unauthorized areas, in the manner set forth in the remedy part of this decision.

(e) Make employees (including but not limited to Steven Powell) whole for any loss of pay they may have suffered by reason of the unilateral discontinuance of the third shift, in the manner set forth in the remedy part of this decision.

(f) Make employees Steven Powell, Frank Colangelo, Dino Grando, Gerald Kulikowski, Frank Brod, and Tim Balmes whole for any loss of pay they may have suffered by reason of Respondent's unilateral change with respect to overtime work for leaders, in the manner set forth in the remedy part of this decision.

(g) Rescind the rule which forbids employees to discuss wages with each other.

(h) Remove from its files any reference to any discharges in consequence of the unilateral change in disciplinary policy for smoking, any discharges or other discipline resulting from the unilateral change with respect to making overtime mandatory rather than voluntary, and any discharges or other discipline for breach of the rule against discussing wages with other employees, and give the employees in question written notification that this has been done and that the personnel action in question will not be used against them in any way.

(i) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, timesheets, personnel records and reports, and all other records necessary or useful for analyzing and computing the amounts due under the terms of this Order.

(j) Post at its Lansing, Illinois facility copies of the attached notice marked ''Appendix.''[25] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director within 20 days from the date of this Order what steps the Respondent has taken to comply.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT forbid you to discuss wages with each other.

WE WILL NOT threaten you with reprisals for wearing union insignia or for discussing with union pickets, during your own time, what is happening on the picket line.

WE WILL NOT interrogate you about protected activity in a manner constituting interference, restraint, or coercion.

WE WILL NOT discourage membership in Highway Drivers, Dockmen, Spotters, Rampmen, Meat Packinghouse and Allied Products Drivers, Helpers and Office Workers and Miscellaneous Employees, Local 710, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or any other union, by changing your job duties, by transferring you, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT make changes with respect to number of shifts, disciplinary policy, wages, amount of overtime, whether employees are required to accept overtime assignments, or any other mandatory subjects of collective bargaining, regarding the following unit for collective bargaining, without giving Local 710 prior notice and an opportunity to bargain:

> All full-time and regular part-time warehousemen and truck drivers, lead persons, janitors and maintenance employees employed at our facility currently located at 16801 Exchange Avenue, Lansing, Illinois, but excluding office clerical employees, service technician employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL rescind our rule which forbids you to discuss wages with each other.

WE WILL, on request by Local 710:

(1) Reinstitute the third shift.

(2) As to the system for assigning overtime, return to the system in effect before October 20, 1988.

(3) As to the discipline to be imposed for smoking in unauthorized areas, return to the system in effect before December 1988.

(4) Rescind the wage increases granted in October and November 1988; but nothing in this Order is to be construed as requiring us to cancel any wage increase without a request from Local 710.

WE WILL offer to any employees who may have been discharged for breach of our unlawful rule against discussing wages with other employees, or in consequence of the unilateral change in disciplinary policy for smoking or the unilateral change which rendered overtime mandatory instead of voluntary, and to any employees (including but not limited to Steven Powell) who were laid off or transferred in consequence of the unilateral discontinuance of the third shift, reinstatement to the jobs of which they were unlawfully deprived, or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to such employees' seniority or other rights and privileges previously enjoyed.

WE WILL make Nicholas Robinson whole, with interest, for any loss of pay he may have suffered by reason of the discriminatory change in his job and duties between November 1988 and about January 1989. He has been reassigned to his previous job and duties.

WE WILL make employees whole, with interest, for any loss of pay they may have suffered by reason of discharge or other discipline for breach of our unlawful rule forbidding discussion of salaries with other employees, or by reason of the unilateral change which rendered overtime mandatory instead of voluntary, or by reason of the unilateral change in the system of discipline for smoking in unauthorized areas.

WE WILL make employees (including but not limited to Steven Powell) whole, with interest, for any loss of pay they may have suffered by reason of the unilateral discontinuance of the third shift.

WE WILL make employees Steven Powell, Frank Colangelo, Dino Grando, Gerald Rulikowski, Frank Brod, and Tim Balmes whole, with interest, for any loss of pay they may have suffered by reason of our unilateral change with respect to overtime work for leaders. As to this matter, the prior policy has been restored.

WE WILL remove from our files any reference to any discharges in consequence of the unilateral change in disciplinary policy for smoking, any discharge or other discipline resulting from the unilateral change with respect to making overtime mandatory rather than voluntary, and any discharges or other discipline for breach of the rule against discussing wages with other employees, and give the employees in question written notification that this has been done and that the personnel action in question will not be used against them in any way.

HIGHLAND SUPERSTORES, INC.